82-5252

NO.____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HENRY ROSTEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was the petitioner's right to due process of law, as guaranteed him by the Fifth Amendment, violated when the Court of Appeals held, as without merit, his claim that it should examine the impounded data relative to any involvement of the Central Intelligence Agency with the co-defendant Kevin Barry Krown, First London Bank and Trust Company and/or the First National Bank of Tehran, S.A.K.?

2. Was the refusal of the Court of Appeals to rule upon the aforesaid request a violation of the requirement under *Brady v. Maryland*, 373 U.S. 83 (1963) as to the prosecutorial divulgement of exculpatory material?

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

HENRY ROSTEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Henry Rosten hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of conviction entered against him in the United States District Court for the Southern District of New York.

ORDER BELOW

An opinion and order was rendered by the United States Court of Appeals for the Second Circuit which is set forth in the Appendix as "Exhibit A".

JURISDICTION

The judgment of affirmance of the Court of Appeals was dated and entered on April 1, 1982. Jurisdiction is conferred upon this Court by 28 U.S.C. 1254(1).

CONSTITUTIONAL AMENDMENT INVOLVED

ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

REASON FOR GRANTING THE WRIT

The petitioner contends that at trial he was deprived of the right to due process of law as guaranteed him under the Fifth Amendment to the United States Constitution.

STATEMENT OF FACTS AT TRIAL

The petitioner Henry Rosten was indicted and charged in six (6) counts of a fifty-six (56) count indictment filed in the United States District Court for the Southern District of New York, with the crimes of conspiring to and substantively violating the federal laws prohibiting mail, wire and bank frauds.

He proceeded to trial before the Hon. Lee P. Gagliardi of that Court and a jury, found guilty and thereafter sentenced to a concurrent fifteen (15) month term of imprisonment.

The instant petition is from the aforesaid judgment of conviction, which was affirmed in an opinion rendered by the United States Court of Appeals for the Second Circuit and as to which an application for a rehearing en banc was denied.

The writer was assigned to represent the petitioner in the United States District Court for the Southern District of New York and that assignment has been continued by the aforesaid Court of Appeals.

A motion for leave to proceed in forma pauperis has been made to this Court.

The facts, as adduced by the government at trial, can be synthesized in the following applicable fashion.

Dwight Garretson, a Special Agent of the Federal Bureau of Investigation, testified that from January, 1977 until June, 1980, he was a legal attache attached to American embassies in the eastern Caribbean including the island of St. Vincent. As such on December 30, 1977 he determined that the First London Bank and Trust Company was registered as an international company. Moreover, that its name was, on August 15, 1978, changed to First National Bank of Tehran, S.A.K. He further testified that he visited the premises of the bank and did not see any vaults, tellers, counters or any indication that a bank was in operation (T. 212-13).*

William Perry testified that he was in the banking business with the co-defendant Kevin Barry Krown and described the banking activities of the co-defendant, Maurice Benjamin, who supplied letters of guarantee to Krown.

He further related that he introduced Helmut Blum, a Certified Public Accountant of Frankfurt,

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*Numerals in parentheses preceded by a "T" refer to pages of the Trial Transcript.

West Germany, to Maurice Benjamin, and subsequently formed an off-shore bank with Krown. This to be predicated upon a 1971 financial statement, recertified by Blum that the London Cambridge Insurance Company had assets of 250 million United States dollars. He further related that he told Krown that there were no such assets and that the statement was worthless. Whereupon Krown and Benjamin agreed to form the First London Bank, each to own fifty per cent thereof (T. 303), and to operate it in the same fashion as Benjamin had operated his own bank, i.e., the Exchange National Bank (T. 305).

Perry further related that Krown thereafter recertified Blum's financial statement. This was eventually filed with the local authorities in St. Vincent for the purpose of obtaining a bank charter, and subsequently reproduced in booklet form (T. 336).

Thereafter the First London Bank and Trust Company obtained a charter and various bank instruments were issued. It was moreover listed in "Polks" advertising directory of Caribbean banks. However, it had no assets and could not provide the banking services that it represented.

Rosten admittedly had nothing whatever to do with the formation of the bank (T. 549-50).

William Stumb, an employee of R.L. Polk & Company, the publishers of Polks World Bank Directory, described the procedure whereby foreign banks were listed in the World Bank Directory.

Hugh Boyd, another employee, testified that Krown wished to and had the First London Bank and Trust Company advertise in the aforesaid World Bank Directory.

Nicholas Agostino testified as to his dealings as a finder for Krown with respect to the First London Bank, as well as the operations thereof (T. 670-85).

He related that he was involved in a transaction with Krown and the petitioner, Henry Rosten, involving a $50,000 letter of credit that was issued for a $5,000 commission (T. 702), as well as a one million dollar certificate of deposit involving a Tennessee Insurance Company (T. 702).

The witness testified that in the late spring or early summer of 1978 he was introduced to the petitioner by the co-defendant Costanzo. That the latter told him that the petitioner was a finder and that they were running together (T. 706). He was additionally told by Costanzo that the petitioner was associated with a Mr. Guggenheim, who was a phony, and that he did not really belong to the Guggenheim family (T. 707).

Agostino further related that in June of 1978 he met Costanzo and Rosten, at the airport, at which time he gave them a one million dollar certificate of deposit drawn on the First London Bank and which had been prepared by Krown.

Some time therafter he again met Rosten and Costanzo. The latter together with one Nat Rosenberg left to go to the airport terminal, and upon their return each had envelopes. Rosenberg and Agostino then went to Krown's apartment (T. 726).

Agostino further related that in the late summer of 1978, he together with Costanzo and the petitioner had a conversation in the petitioner's apartment at which time he was told by them that they were going to open in Jamaica with Mr. Guggenheim.

Irving King, the Assistant Treasurer of the Central State Bank, related that the First London Bank and Trust Company had an account with said bank.

James E. Spry, the plant manager of Deluxe Check Printers, testified that checks were printed by it for the First London Bank and Trust Company Limited.

Manuel Delahoz, a former employee of Citibank, testified that the bank cashed two checks drawn on the First London Bank and John Fitzgerald, an assistant manager, testified that the checks were uncollectable.

Owen C. Murray, an uncertified Tennessee insurance underwriter, testified that in order to obtain a certificate of authority from the Tennessee Insurance Commission, his company needed $1,300,000 in capital and surplus. Not having that amount he sought additional capital in the form, amongst others, of a certificate of deposit and eventually contacted the petitioner.

There was an initial telephone conversation at which time Murray described the use to be made of the certificate of deposit and that it was to be unencumbered, i.e., cashable and usable. Rosten responded that there should be no difficulty in obtaining such a document and that he was closely associated with one David Guggenheim.

The witness then went to New York where he met the petitioner and Costanzo.

Rosten told him that he would not be able to obtain a certificate of deposit through the Chase Manhattan Bank but would obtain it through the First London Bank and Trust Company.

That the latter was a well-funded company and that there would be no difficulty in the certificate being recognized by the insurance department as a part of his financial statement. That a telex would be sent confirming the issuance of a certificate of deposit in the name of the Tennessee insurance company (T. 1240).

That the fee for obtaining said certificate of deposit was to be $90,000, $50,000 down and $10,000

per month for the succeeding four months (T. 1240-41).

Thereafter he was introduced by the petitioner to David Guggenheim. Murray subsequently issued a post-dated check for the amount of the certificate of deposit and in turn received the same. He also received a telex indicating the issuance of the certificate of deposit signed by Krown. This in turn was given to the First Tennessee Bank. The latter however forwarded to Murray a bulletin issued by the Comptroller of the Currency.

He thereafter received telephone calls from Krown requesting the initial $10,000 monthly payment. Also from Costanzo as to alternate funding, and from the petitioner offering to assist him through certain financial sources in Connecticut (T. 1259).

A meeting was subsequently held in New York, attended by Federal Bureau of Investigation agents, with the petitioner and Costanzo. There Costanzo gave a copy of a financial statement of the First London Bank, as well as a sheet from the Polks Directory.

Murray stated that the use of the certificate of deposit was inhibited as a result of the bulletin from the Comptroller of the Currency. Costanzo then was alleged to have replied that it was inapplicable and referred only to other documents (T. 1224).

The witness further related that the petitioner joined in the conversation, but was unable to specify any aspect thereof save that he would assist in obtaining capitalization (T. 1265). Moreover that the bank had substantial mining properties in Peru, as well as holdings in Germany, and that it was well funded.

On the following day, Murray, in the absence of the petitioner, together with agents of the Federal Bureau of Investigation, met with Krown and discussions were had as to the assets of the bank.

Jerry Thompson, who provided the $50,000 to Murray to rent the certificate of deposit, testified that he met the petitioner at the Roosevelt Hotel. That the petitioner stated that he had gone to great trouble to obtain the certificate of deposit, that it was a good certificate, that it was usable in the way that Murray wanted to use it and that it was backed by the Guggenheim (T. 1346).

He also testified that after he had learned of the invalidity of the certificate of deposit he had a telephone conversation with the petitioner. The latter was then alleged to have stated that there was some mistake, the certificate would be made good and in a few days everything would be straightened out. Moreover, the petitioner is alleged to have stated that the money that had been paid was non-refundable, and at Thompson's request forwarded a copy of the financial statement to the bank (T. 1348-49).

Thompson further related that he contacted the Bank at St. Vincent and was assured that it was a valid artifact. He also contacted Blum in West Germany, who assured him that the bank assets were real and that if the witness had bank paper it was good paper (T. 1351).

John Barry, a Special Agent of the Federal Bureau of Investigation, testified that he accompanied Murray to the July 17, 1978 meeting with Rosten and Costanzo where the latter acknowledged receipt of the $50,000. Additionally there was a discussion as to merchant banking. Thereafter the petitioner was alleged to have told Agent Barry that the type of banking arrangement that Murray had become involved in was a merchant bank arrangement and that such banks occasionally had more money than the Bank of America. Agent Barry further related that the petitioner assured Murray and him

that the First London Bank and Trust Company was "well footed". The co-defendant Costanzo thereupon was alleged to have demonstrated as bona fides an advertisement from Polks Banking Directory and a certified statement prepared in Germany showing that the assets of the bank were in excess of 200 million dollars (T. 1379-81).

Additionally Rosten was alleged to have stated that if the Germans had certified the statement it must be right (T. 1381).

On cross-examination Agent Barry conceded that he could not recall the context in which Mr. Guggenheim's name was mentioned or that Mr. Guggenheim guaranteed the financial instrument that was issued to the Tennessee Valley Insurance Company. He further conceded that no one at the meeting on July 7, 1978 asked the petitioner whether anyone from the Guggenheim family stood behind the bank or the certificate of deposit.

John Rooney, a branch operating officer of the Chemical Bank, testified that the petitioner had deposited a $1,000 check which was made payable to Krown, but which was credited to the account of the First National Bank of Tehran and thereafter returned as drawn on insufficient funds (T. 3114).

A motion to dismiss under Rule 29 of the Federal Rules of Criminal Procedure predicated upon an evidentiary insufficiency as to knowledge and intent was timely made, reserved and subsequently denied.

A stipulation was entered into at the close of the entire case to the effect that if Agostino was recalled he would testify that in the summer of 1978 he had a conversation with the petitioner at which time the latter stated that he was going to set up a bank in Jamaica just like Krown's. Additionally that a charter would be obtained in the same manner using the same

paper, except that cashiers checks, the source of the problems, would not be used.

The petitioner, who did not testify nor call any witness on his behalf, was found guilty as charged.

POINT ONE

THE PETITIONER WAS DENIED DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT WHEN THE COURT OF APPEALS DEEMED MERITLESS HIS CLAIM THAT IT SHOULD EXAMINE THE IMPOUNDED DATA RELATIVE TO ANY INVOLVEMENT OF THE CENTRAL INTELLIGENCE AGENCY WITH THE CO-APPELLANT KEVIN BARRY KROWN, FIRST LONDON BANK AND TRUST COMPANY, AND/OR THE FIRST NATIONAL BANK OF TEHRAN, S.A.K.

On April 16, 1981, some forty (40) days after verdict, counsel for the key co-defendant Kevin Krown addressed the following singular communication to the Court:

Saxe, Bacon & Bolan, P.C.
39 East 68th Street
New York, New York 10021

Hon. Lee P. Gagliardi
United States District Judge
United States Courthouse
Foley Square
New York, New York 10007

Re: *United States v. Krown*
S80 CR 673 (LPG)

Dear Judge Gagliardi:

Please consider this letter as an application to adjourn Kevin Krown's sentence from April 29, 1981 to May 19, 1981. I understand that the sentences of three co-defendants have already been adjourned to the May date.

I have been informed that developments in the sentencing hearing of Mr. Krown (and Mr. Feeney) which occurred before the Honorable Fred M. Winner, Chief Judge of the United States District Court for the District of Colorado on April 6-9, 1981, may have—and in my humble opinion—will have a substantial impact on both the sentencing phase of the New York case as well as on its future litigation. We ask for the May date to enable us to transmit to you a copy of the transcript of the aforesaid Denver proceedings which should be available by the end of this month.

By this letter I also seek authorization from the Court to advise Chief Judge Winner in writing that at the trial in New York a proffer of proof was made by me, as counsel for Mr. Brown, relating to Mr. Krown's relationship, or that of his bank with the U.S. Central Intelligence Agency. I do not intend to enumerate the specifics of such proffer, but to merely communicate that same was made. In light of the fact that this was done *in camera* I feel that I cannot divulge even the fact that it was done without this Court's authorization.

Thank you for your patience and invariable courtesies.

Respectfully,

Michael Rosen

MR:ds

cc: A.U.S.A. Carolyn Henneman
One St. Andrew's Plaza
New York, New York 10007

Predicated upon the same the petitioner, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, moved for a new trial and sought a hearing. This application was based upon the constitutional mandates set forth as to exculpatory material in *Brady v. Maryland*, 373 U.S. 83 (1963); governmental intrusion as prohibited by *Messiah v. United States*, 377 U.S. 201 (1964) and prosecutorial impropriety exceeding that barred in *Hampton v. United States*, 425 U.S. 484 (1976) and *Rochin v. California*, 342 U.S. 165 (1952).

The Trial Court denied the application stating that all the material referred to in the letter was impounded and available for inspection by the Court of Appeals.

That on direct appeal it was requested that the Court of Appeals, *in camera*, examine all of the aforesaid impounded material and determine whether error was committed in not making the same available to defense counsel.

The Court of Appeals made no pointed response to this request in rendering its initial determination or in denying a rehearing en banc.

It is not without significance that the writer of the above letter had previously made reference to covert contact between Agent Gerretsen of the Federal Bureau of Investigation and Krown, as well as between Krown and the Central Intelligence Agency (T. 247, 248, 308, 310, 3433, 3434).

It is submitted that the refusal of the Court of Appeals to conduct an *in camera* examination of the impounded material and make a finding with respect thereto, unduly limited the scope of cross-examination of the prosecution witnesses, deprived the petitioner of due process of law and was violative of the requirement of prosecutorial disclosure as mandated under

Brady v. Maryland, supra, and thus violative of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(212) 349-3900

EXHIBIT A – ORDERS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 278, 279, 280, 281, 282, 370, 371—August Term, 1981

(Argued: October 27, 1981 Decided: April 1, 1982)

Docket Nos. 81-1192, 1195, 1196, 1197, 1203, 1204, 1254

UNITED STATES OF AMERICA,

Appellee,

—against—

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Before:

MOORE and NEWMAN, *Circuit Judges* and GRIESA,* *District Judge.*

Appeals from judgments of conviction of the District Court of the Southern District of New York (Hon. Lee P. Gagliardi) on various counts of fraud involving financial instruments issued by fictitious off-shore banks. The convictions are affirmed, except as to certain of the counts against defendants Krown and Benjamin which charge the passing of worthless checks in violation of 18 U.S.C. § 1014. The convictions on these counts are reversed on the ground that the statute does not apply to such conduct.

* The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

CAROLYN HANNEMAN, ESQ., Assistant United States Attorney (John S. Martin, Jr., United States Attorney for the Southern District), *for the Appellee.*

KEVIN KROWN, New York, New York, *Defendant-Appellant Pro Se.*

BARRY M. FALLICK, ESQ., New York, New York (Rochman, Platzer & Fallick), *for Defendant-Appellant Maurice Benjamin.*

THOMAS F. LIOTTI, ESQ., Carle Place, New York, *for Defendant-Appellant Feeney.*

THEODORE KRIEGER, ESQ., New York, New York, *for Defendant-Appellant Rosten.*

JOSEPH P. HOEY, ESQ., Mineola, New York (Suozzi, English, Cianciulli & Peirez, P.C.), *for Defendant-Appellant Rosen.*

BARRY A. BOHRER, ESQ., New York, New York, *for Defendant-Appellant Costanzo.*

GRIESA, *District Judge:*

Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo appeal from judgments of the District Court for the Southern District of New York, following a five-week jury trial before Hon. Lee P. Gagliardi, convicting each of them on multiple counts of violation of federal anti-fraud statutes.

We affirm the convictions, except that we reverse as to two counts (53 and 54) of the 49 counts on which Krown was convicted, and as to three counts (53, 54 and 55) of the eight

counts on which Benjamin was convicted.[1] Counts 53, 54 and 55 of the indictment charge these defendants with passing worthless checks in violation of 18 U.S.C. § 1014. We hold that this statute is inapplicable to the type of conduct charged.

The proof at trial showed a fraudulent scheme built around two fictitious off-shore banks called First London Bank and Trust Co. and First National Bank of Teheran purportedly located in St. Vincent, West Indies. Large amounts of money were obtained from various victims by the use of fraudulent financial instruments held out as being issued by these banks.

We have considered all the issues raised on appeal, and find that all are without merit except the challenge to the applicability of § 1014.

I.

The facts relevant to this issue are as follows. In November 1978 a company connected with Benjamin purchased certain quantities of meat from a wholesale supplier, one Theresa Amelar. In payment for the first two shipments Benjamin gave Mrs. Amelar two purported certified checks drawn on First National Bank of Teheran ("FNBT") in the amounts of $15,000 and $45,000.

Mrs. Amelar deposited these checks in her account at Marine Midland Bank. Marine Midland put these checks into the federal clearinghouse system for collection. They were promptly returned to Marine Midland stamped "No Such Bank." Mrs. Amelar informed Benjamin of this. Benjamin said to have Marine Midland mail the checks directly to St. Vincent for collection. Accordingly, the checks were resubmitted to Marine Midland, which mailed them to St. Vincent.

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[1] Krown was sentenced to 15 years imprisonment and was fined a total of $86,000. Benjamin was sentenced to 6 years imprisonment and was fined a total of $29,000. The partial reversals as to Krown and Benjamin will not reduce their terms of imprisonment. However, Krown's fines will be reduced by $10,000 ($5,000 on each of the two reversed counts), and Benjamin's fines will be reduced by $15,000 ($5,000 on each of the three reversed counts).

While this process was going on, Benjamin placed an order with Mrs. Amelar for a third shipment of meat. This order was filled, and Benjamin gave Mrs. Amelar a third purported certified check drawn on FNBT. This check was for $29,919.32, and was deposited with Mrs. Amelar's account at Marine Midland, which mailed the check directly to St. Vincent for collection.

Later, Benjamin obtained a genuine Bankers Trust Company certified check for $15,000. He sent it directly to Marine Midland for deposit in Mrs. Amelar's account. This was done in order to make it appear to Mrs. Amelar that the original $15,000 FNBT check had been honored.

Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

It does not appear that Krown participated directly in the dealings with Mrs. Amelar, although it was he who "created" the fictitious FNBT.

Marine Midland Bank is a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

II.

Section 1014 provides in pertinent part:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by

renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

"The essential elements which must be proved in order to establish this offense against any defendant are:

1. That the defendant in question knowingly made, caused to be made or aided and abetted the making of the false statement or overvaluation concerning a material fact;

2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;

3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an additional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with an advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could,

under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collection of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States v. Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congressional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States v. Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States v. Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to

permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of June, one thousand nine hundred and eighty-two.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,
Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
JUN 16 1982
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

Nos. 81-1192, 81-1195, 81-1196, 81-1197, 81-1203
81-1204, 81-1254

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony Costanzo, James Feeney, Henry Rosten and Roger Rosen, and by the defendant-appellant, Anthony Costanzo, pro se,

Upon consideration by the panel that heard the appeals, it is

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeals and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by: s/ Francis X. Gindhart
Francis X. Gindhart
Chief Deputy Clerk

82-5252

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

HENRY ROSTEN,

Petitioner

-against-

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

S I R S:

Petitioner, HENRY ROSTEN, moves this Court for an Order permitting him to file a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit from the judgment entered therein on April 1, 1982, a petition for a rehearing having been denied on June 16, 1982, in forma Code, Section 1915, and in support thereof submits the annexed affidavit and exhibits.

Dated: New York, New York
July 20, 1982

Yours, etc.

THEODORE KRIEGER
Attorney for Petitioner
Office & P.O. Address
132 Nassau Street
New York, N.Y. 10038
(212) DI 9-3900

TO: SOLICITOR GENERAL OF THE UNITED STATES
Department of Justice
Washington, D.C.

(over)

United States Attorney
Southern District of new york
One St. Andres Plaza
New York, N.Y., 10007

United States Supreme Court
Washington, D.C., 20543

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

HENRY ROSTEN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

State of New York)
) ss.:
County of New York)

THEODORE KRIEGER, being duly sworn, deposes and says:

1. That the petitioner, Henry Rosten, has been heretofore adjudicated to be an indigent and thereafter your deponent was, pursuant to the Criminal Justice Act, assigned to represent him in the United States District for the Southern District of New York.

2. That pursuant to an Order of the United States Court of Appeals for the Second Circuit, a copy of which is attached hereto and designated as "Exhibit A", the aforesaid assignment of ypur deponent as counsel for the petitioner was continued by the Court of Appeals.

3. That your deponent is not aware of any fact or circumstance which has in any fashion affected the initial and continuing determination as to the petitioner's indigency.

4. That the petitioner, who has been heretofore sentenced to serve a term of imprisonment of fifteen (15) months, was thereupon released on a personal recognizance bond.

5. That the petitioner was convicted after a jury trial of the crimes of conspiring to and substantively violate 18 U.S.C. 371, 1341 and 1343, arising from the alleged commission of wire, mail and bank frauds.

6. That the judgment of conviction was affirmed by an Order and Opinion dated April 1, 1982, a copy of which is attached hereto and designated as "Exhibit B".

7. That an application for a rehearing in banc was made and denied in June 16, 1982, a copy of which is attached hereto and designated as "Exhibit C".

8. that your deponent will file a Petition for a Writ of Certiorari to this Court predicated upon the contention that the petitioner was deprived of his right to due process of law as guarantee him under the Fifth.

9. That the Court of Appeals did not respond to the petitioner's pivotal point that it should, in camera, examine the data impounded by the District Court relative to any involvement of the Central Intelligence Agency with the co-defendant Kevin Barry Krown, First London Bank and Trust Company, and/or The First National Bank of Tehran, S.&K, save as to an omnibus statement that all issues raised on appeal were without merit except the challenge to the applicability of 18 U.S.C. 1014.

10 That it is respectfully submitted that the refusal of the Court of Appeals to rule upon this issue which may contain exculpatory material as set forth under Brady v Maryland, 373 U.S. 83 (1963) was error.

11. That your deponent submits that the petition is meritorious, worthy of appellate consideration and in no way frivolous.

WHEREFORE, the finding of indigency having previously been made by the United States District Court for the Southern District of New York and continued by the United States Court of Appeals for the Second Circuit. It is submitted that the instant application for leave to appeal in forma pauperis should be granted, for all of which no prior application has been made to this Court or any Justice thereof.

Sworn to before me this
29th day of July, 1982.

Bernard P. Rose

BERNARD P. ROSE
NOTARY PUBLIC, State of New York
No. 41-8039225
Qualified in Queens County
Commission Expires March 30, 19 84

Theodore Krieger

Theodore Krieger
Attorney for Petitioner
132 Nassau Street
New York, New York 10038
(212) DI-9-3900

FOR THE SECOND CIRCUIT EXHIBIT A

Erna Carotenuto
(212) 791-0105

NITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ROGER ROSEN, JAMES W. FEENEY, ANTHONY COSTANZO, KEVIN BARRY KROWN, HENRY ROSTEN, MAURICE BENJAMIN,

Defendants-Appellants

CRIMINAL APPEAL
SCHEDULING ORDER #1

Docket Nos. 81-1192-Rosen
81-1195-Feeney
81-1196-Costanzo
81-1197-Krown
81-1203-Rosten
81-1204-Benjamin
81-1254-Krown

81-1192

The court having continued Theodore Krieger, Esq. as counsel for the appellant Henry Rosten, Thomas F. Liotti, Esq. as counsel for the appellant James W. Feeney, Barry A. Bohrer, Esq. as counsel for the appellant Anthony Costanzo pursuant to the Criminal Justice Act; and

The court noting that Joseph P. Hoey, Esq. is counsel for the appellant Roger Rosen, Barry Fallick, Esq. is counsel for the appellant Maurice Benjamin and that their respective docketing fees paid to the Clerk of the District Court within 10 days after the filing of their respective notices of appeal; and

The Court noting that Kevin Barry Krown is appealing Pro Se; and

It further noting that notices of appeal by the defendants-appellants have been filed beginning May 17, 1981 and the last one June 15, 1981; and

It further noting that Barry Fallick, Esq. and Theodore Krieger, Esq. have expressed their willingness to be lead and associate lead counsel for the defendants-appellants in this Court; now

IT IS HEREBY ORDERED that Barry Fallick, Esq. and Theodore Krieger, Esq. are appointed lead and associate lead counsel respectively; and

IT IS FURTHER ORDERED that the court reporter shall file with the Clerk of the District Court within 30 days from receipt of the transcript order those transcripts ordered pursuant to F.R.A.P. Rule 10 (b)(1). Any motions by the court reporter to extend the time to file the transcripts shall be made not less than 7 days before the transcripts are due, unless exceptional circumstances exist.

IT IS FURTHER ORDERED that counsel shall forward a copy of any amendment, correction, or supplement to the initial transcript order to this court and to the Clerk of the District Court forthwith.

IT IS FURTHER NOTED that the record on appeal has been filed on June 16, 1981;

IT IS FURTHER ORDERED that the appellants' may, without further order of the court, remove the record for purposes of preparation of the appellants' brief(s) and joint appendix provided that the record is returned to the custody of the court on or before the date set for filing the appellants' brief(s); and

IT IS FURTHER ORDERED that appointed counsel for the respective defendants-appellants shall serve and file xerographic copies of their brief(s) and appendix; and

IT IS FURTHER ORDERED that retained counsel shall serve and file their brief(s) and appendix and that they may be produced in the form authorized by F.R.A.P. Rule 32(a); and

IT IS FURTHER ORDERED that ten (10) copies of all defendants-appellants brief(s) and JOINT APPENDIX be served and filed on or before August 10, 1981, default of which their respective appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that the appendix, in addition to whatever else it includes, shall include copies of the district court docket entries, the indictments, the District Court's charge(s), the judgment(s) of convictions and opinion(s) of the District Court; and

IT IS FURTHER ORDERED that the United States shall serve and file ten (10) copies of its brief on or before September 9, 1981 and that it may be produced in the form authorized by F.R.A.P. Rule 32(a), except that a response to a brief filed pursuant to Anders v. California, 386 U.S. 738 (1967) shall be served and filed in lieu if a brief by not later than August 24, 1981.

IT IS FURTHER ORDERED that counsel for each of the defendants-appellants shall cooperate with counsel for all other defendants-appellants to carry out the purpose and intent of F.R.A.P. Rule 28(i) so as to coordinate the legal issues which they wish to raise and insofar as possible join in a single brief on such issues and avoid duplication with respect thereto and that for these purposes lead and associate lead counsel shall coordinate the taking of as many steps in this direction as practicable; and

IT IS FURTHER ORDERED that any counsel proceeding pursuant to the Criminal Justice Act shall submit a completed voucher (CJA-20) by not later than five (5) days after the filing of the appellee's response; and

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of September 21, 1981, except that an appeal in which an Anders brief has been filed shall be ready to be heard immediately following the receipt of the response of the appellee.

IT IS FURTHER ORDERED that motions for extension of time will not be granted absent most extraordinary circumstances.

Dated: June 30, 1981

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

"Exhibit B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 278, 279, 280, 281, 282, 370, 371—August Term, 1981

(Argued: October 27, 1981 Decided: April 1, 1982)

Docket Nos. 81-1192, 1195, 1196, 1197, 1203, 1204, 1254

UNITED STATES OF AMERICA,

Appellee,

—against—

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Before:

MOORE and NEWMAN, *Circuit Judges*
and GRIESA,* *District Judge.*

Appeals from judgments of conviction of the District Court of the Southern District of New York (Hon. Lee P. Gagliardi) on various counts of fraud involving financial instruments issued by fictitious off-shore banks. The convictions are affirmed, except as to certain of the counts against defendants Krown and Benjamin which charge the passing of worthless checks in violation of 18 U.S.C. § 1014. The convictions on these counts are reversed on the ground that the statute does not apply to such conduct.

* The Honorable Thomas P. Griesa of the United States District Court for the Southern District of New York, sitting by designation.

CAROLYN HANNEMAN, ESQ., Assistant United States Attorney (John S. Martin, Jr., United States Attorney for the Southern District), *for the Appellee.*

KEVIN KROWN, New York, New York, *Defendant-Appellant Pro Se.*

BARRY M. FALLICK, ESQ., New York, New York (Rochman, Platzer & Fallick), *for Defendant-Appellant Maurice Benjamin.*

THOMAS F. LIOTTI, ESQ., Carle Place, New York, *for Defendant-Appellant Feeney.*

THEODORE KRIEGER, ESQ., New York, New York, *for Defendant-Appellant Rosen.*

JOSEPH P. HOEY, ESQ., Mineola, New York (Suozzi, English, Cianciulli & Peirez, P.C.), *for Defendant-Appellant Rosen.*

BARRY A. BOHRER, ESQ., New York, New York, *for Defendant-Appellant Costanzo.*

GRIESA, *District Judge:*

Kevin Krown, Maurice Benjamin, James Feeney, Henry Rosten, Roger Rosen and Anthony Costanzo appeal from judgments of the District Court for the Southern District of New York, following a five-week jury trial before Hon. Lee P. Gagliardi, convicting each of them on multiple counts of violation of federal anti-fraud statutes.

We affirm the convictions, except that we reverse as to two counts (53 and 54) of the 49 counts on which Krown was convicted, and as to three counts (53, 54 and 55) of the eight

counts on which Benjamin was convicted.[1] Counts 53, 54 and 55 of the indictment charge these defendants with passing worthless checks in violation of 18 U.S.C. § 1014. We hold that this statute is inapplicable to the type of conduct charged.

The proof at trial showed a fraudulent scheme built around two fictitious off-shore banks called First London Bank and Trust Co. and First National Bank of Teheran purportedly located in St. Vincent, West Indies. Large amounts of money were obtained from various victims by the use of fraudulent financial instruments held out as being issued by these banks.

We have considered all the issues raised on appeal, and find that all are without merit except the challenge to the applicability of § 1014.

I.

The facts relevant to this issue are as follows. In November 1978 a company connected with Benjamin purchased certain quantities of meat from a wholesale supplier, one Theresa Amelar. In payment for the first two shipments Benjamin gave Mrs. Amelar two purported certified checks drawn on First National Bank of Teheran ("FNBT") in the amounts of $15,000 and $45,000.

Mrs. Amelar deposited these checks in her account at Marine Midland Bank. Marine Midland put these checks into the federal clearinghouse system for collection. They were promptly returned to Marine Midland stamped "No Such Bank." Mrs. Amelar informed Benjamin of this. Benjamin said to have Marine Midland mail the checks directly to St. Vincent for collection. Accordingly, the checks were resubmitted to Marine Midland, which mailed them to St. Vincent.

---

[1] Krown was sentenced to 19 years imprisonment and was fined a total of $86,000. Benjamin was sentenced to 6 years imprisonment and was fined a total of $29,000. The partial reversals as to Krown and Benjamin will not reduce their terms of imprisonment. However, Krown's fines will be reduced by $10,000 ($5,000 on each of the two reversed counts), and Benjamin's fines will be reduced by $15,000 ($5,000 on each of the three reversed counts).

While this process was going on, Benjamin placed an order with Mrs. Amelar for a third shipment of meat. This order was filled, and Benjamin gave Mrs. Amelar a third purported certified check drawn on FNBT. This check was for $29,919.32, and was deposited with Mrs. Amelar's account at Marine Midland, which mailed the check directly to St. Vincent for collection.

Later, Benjamin obtained a genuine Bankers Trust Company certified check for $15,000. He sent it directly to Marine Midland for deposit in Mrs. Amelar's account. This was done in order to make it appear to Mrs. Amelar that the original $15,000 FNBT check had been honored.

Ultimately, of course, Marine Midland's efforts to collect the three checks from FNBT were fruitless. Although the amounts of the three fraudulent checks were temporarily credited to Mrs. Amelar's account, by way of a bookkeeping entry, there is no evidence that Mrs. Amelar made any withdrawal from her account or received a payment of any kind from the bank, based on the balance created by the three checks.

It does not appear that Krown participated directly in the dealings with Mrs. Amelar, although it was he who "created" the fictitious FNBT.

Marine Midland Bank is a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

II.

Section 1014 provides in pertinent part:

"Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any bank the deposits of which are insured by the Federal Deposit Insurance Corporation . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by

renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both."

Judge Gagliardi charged the jury on the elements which needed to be proved for conviction on the § 1014 counts:

"The essential elements which must be proved in order to establish this offense against any defendant are:

1. That the defendant in question knowingly made, caused to be made or aided and abetted the making of the false statement or overvaluation concerning a material fact;

2. That the statement was made for the purpose of influencing the bank's action with respect to an application or advance, commitment or loan;

3. That the bank was insured by the FDIC."

In his explanation of the term "overvaluation" in the first element, the judge made it clear that he was referring to the overvaluation of security within the language of § 1014, and stated to the jury that a check, about which a false statement has been made as to its value, would be an overvalued security.

Thus, under the trial judge's instruction, the jury was permitted to find Benjamin and Krown guilty under § 1014, if the jury found that they made or caused to be made a false statement or overvaluation of security which had the purpose of influencing a bank upon an advance, loan, application or commitment.

An initial question is whether the statute is limited to frauds committed directly against the financial institutions referred to in the statute. Benjamin's fraud was directed primarily against Mrs. Amelar. Benjamin did not deal directly with Marine Midland, except in the one instance when he sent the $15,000 Bankers Trust check for deposit in her account.

The statute is not limited by its terms to direct dealings with banks. It covers the making of false statements "for the purpose of influencing in any way" the action of an FDIC insured bank upon certain types of transactions. Thus, the statute is broad enough to apply to fraudulent dealings with third persons where it could *also* be said that there was the purpose to influence a bank upon one of the transactions named in the statute.

In the present case, when Benjamin gave the first two FNBT checks to Mrs. Amelar, he must have known that she would deposit these checks in a bank. After Mrs. Amelar told Benjamin about the problem with the checks, Benjamin's suggestion to have Marine Midland send the checks directly to St. Vincent was designed to prolong the bank's collection process in order to gain time for further fraudulent dealings with Mrs. Amelar. With regard to the third FNBT check, Benjamin intended that the check be deposited in the bank and that the bank would undertake collection via mail to St. Vincent. Benjamin's deposit of the Bankers Trust check at Marine Midland was an additional act intended to maintain a facade of regularity in his dealings with Mrs. Amelar.

Thus Benjamin was using Marine Midland to facilitate his fraud against Mrs. Amelar. In terms of the statute, it can be said that he had "the purpose of influencing" Marine Midland to accept the certified checks for deposit in Mrs. Amelar's account and to process those checks for collection over as long a time as possible.

This brings us to the issue of whether the certified FNBT checks were false statements or overvalued security within the meaning of § 1014, and the further issue of whether Benjamin had the purpose of influencing the bank in connection with an advance, loan, application or commitment.

It would seem clear that a fraudulent certified check can be a false statement within the meaning of § 1014. Such a check constitutes a representation that the check has been accepted by the drawee bank and will be paid upon presentation. It would also appear that a worthless check could,

under certain circumstances, constitute overvalued security for an advance, loan or commitment.

However, there is no basis in the evidence for a finding that Benjamin had the purpose of influencing the bank to use the FNBT checks in connection with an advance, loan, application or commitment. The interpretation of these terms in the statute has produced a split in the circuit decisions. The Fifth Circuit has held that the deposit of worthless checks in a bank and subsequent withdrawal of funds based upon those checks, can constitute an advance or loan within the meaning of § 1014. *United States v. Williams*, 639 F.2d 1311 (5th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3375 (Nov. 10, 1981) (No. 80-2116); *United States v. Payne*, 602 F.2d 1215 (5th Cir. 1979), *cert. denied*, 445 U.S. 903 (1980). Both of these cases involved check kiting schemes. The theory of these decisions is that the banks granted immediate credit to the depositors by permitting withdrawals from the account prior to the collection of the deposited checks, and that such immediate credit was an advance or loan. The Third Circuit, declining to follow the *Payne* and *Williams* decisions, has held § 1014 inapplicable to a check kiting scheme. *United States v. Sher*, 505 F. Supp. 858 (W.D. Pa.), *aff'd per curiam*, 657 F.2d 28, *reh'g en banc denied*, 661 F.2d 34 (3d Cir. 1981). The *Sher* decision relied upon the reasoning in *United States v. Pavlick*, 507 F. Supp. 359 (M.D. Pa. 1980). The Third Circuit cases express concern about the possibility that an expansive reading of § 1014 will make that statute a general criminal remedy against the passing of worthless checks, contrary to Congressional intent.

We agree that § 1014 is not designed to have general application to the passing of worthless checks, and that the language of the statute, limiting it to the specified credit transactions, must be given effect. The Second Circuit has warned against construing § 1014 in such a manner as to transform what would normally be state criminal offenses into federal crimes. *United States v. Sabatino*, 485 F.2d 540, 543 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

It is unnecessary for us to choose between the Fifth Circuit and Third Circuit views regarding the applicability of § 1014 to check kiting schemes, because the present case does not involve check kiting. Also, it is unnecessary for us to decide whether the granting of immediate credit by a bank, in the form of permitting a withdrawal of funds prior to the collection of a deposited check, constitutes an advance or loan within the meaning of § 1014. In the present case there was no such granting of immediate credit or permission to withdraw funds. All that occurred between Mrs. Amelar and the bank was that she deposited the checks in her account, following which the bank made a bookkeeping entry showing the checks credited to her account, and then attempted to collect the checks. Mrs. Amelar received no funds from the bank based upon the three fraudulent checks, either in the form of a conventional advance or loan or by way of a withdrawal from her account. The mere bookkeeping credit entry did not constitute an advance or loan within the meaning of § 1014.

Not only was there in fact no advance or loan to Mrs. Amelar, but there is no evidence that Benjamin had the purpose of influencing the bank in connection with an advance or loan. The mere intent to have the bank accept the certified checks for deposit and carry out collection procedures is not sufficient to violate the statute.

It is equally true that there was no "application" or "commitment," or any evidence of a purpose by Benjamin to cause such. These broad terms must be interpreted with reference to the statute as a whole, and can only refer to an application or commitment involving an advance or loan or other credit transaction listed in the statute. *See United States v. Pavlick*, 507 F. Supp. 359, 362 (M.D. Pa. 1980). The case relied upon by the Government for the proposition that there was a commitment in the present case, *United States v. Stoddart*, 574 F.2d 1050 (10th Cir. 1978), is distinguishable. That case involved an agreement by a bank to

permit a withdrawal from an account following a fraudulent representation to the bank by the depositor.

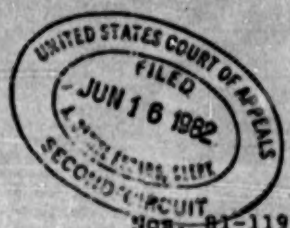
For the foregoing reasons Benjamin's conviction on the § 1014 counts cannot stand. The convictions of Krown on these counts must also fall, since Krown's liability could only derive from that of Benjamin.

The convictions are affirmed, except as to Counts 53 and 54 against Krown and Counts 53, 54 and 55 against Benjamin. As to these counts, we reverse and remand with directions to enter judgments of dismissal.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

"EXHIBIT C"

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 16th day of June, one thousand nine hundred and eighty-two.



UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

KEVIN KROWN, MAURICE BENJAMIN, JAMES FEENEY, HENRY ROSTEN, ROGER ROSEN and ANTHONY COSTANZO,

Defendants-Appellants.

Nos. 81-1192
81-1195
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81-1203
81-1204
81-1254

Petitions for rehearing containing suggestions that the actions be reheard in banc having been filed herein by counsel for the defendants-appellants, Anthony Costanzo, James Feeney, Henry Rosten and Roger Rosen, and by the defendant-appellant, Anthony Costanzo, pro se,

Upon consideration by the panel that heard the appeals, it is ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeals and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart

Francis X. Gindhart
Chief Deputy Clerk

WAIVER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM,1982

HENRY ROSTEN, PETITIONER

vs. No. 82-5252

UNITED STATES OF AMERICA, RESPONDENT

WAIVER

The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court.

REX E. LEE
Solicitor General

AUGUST 25, 1982

cc: THEODORE KRUEGER
132 Nassau Street
New York, New York 10038
(Special Delivery Mail)

(Formerly G-56) FORM OSG-13
DOJ 12-7-76